U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL 80

ARB Case No. 00-030
(formerly ARB Case No. 00-007)

***In re*: Application of Wage Determination No. 94-2103, Rev. 17, 7/9/98, to work performed by Court Security Officers in the Washington, D.C., Metropolitan Area.**

DATE: August 31, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Complainant:
Bruce C. Cohen, Esq., *Clayton, Missouri*

For the Respondent:
Ford F. Newman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.
U.S. Department of Labor, Washington, D.C.

FINAL DECISION AND ORDER

This case is before the Administrative Review Board on a petition for review filed by the United Government Security Officers of America (Union). The Union (through its affiliated Local 80) represents court security officers who work on a service contract with the U.S. Marshals Service in the Washington, D.C., area. The employer that holds the contract with the Marshals Service is AKAL Security (AKAL). The contract is subject to the Service Contract Act, as amended, 41 U.S.C. §351 *et seq.* (1994) (SCA or Act).

The dispute presented in this case involves the correct prevailing wage rate for the court security officers on AKAL's contract for the FY99 contract option year, which began October 1, 1998. In a final decision letter issued by the Administrator's designee on November 30, 1999, the Administrator determined that the correct SCA prevailing wage rate for the court security officers was $16.65/hr., based on wage rates found in a collective bargaining agreement between the Union and AKAL. The Union argues that a higher wage rate of $17.57/hr., as found in the Administrator's

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[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

"area wage determination" for the Washington, D.C., area, should have been applied to the FY99 procurement contract pursuant to 29 C.F.R. §4.165(c) (1999). We have jurisdiction pursuant to 29 C.F.R. §8.1 (1999).

For the reasons discussed below, we affirm the Administrator's decision and deny the petition for review.

BACKGROUND

AKAL entered into a contract with the U.S. Marshals Service to provide court security services in the Washington, D.C., area beginning October 1, 1997. Sometime during AKAL's first year on the contract, it entered into a collective bargaining agreement with Local 80. The negotiated wage rate for court security officers under the collective bargaining agreement was $16.65/hr. Administrative Record (AR) Tab C.[2/]

Sometime prior to October 1, 1998, it appears that the Marshals Service requested that the Wage and Hour Division issue a wage determination establishing SCA minimum wage rates for the FY99 procurement year. Apparently believing that no collective bargaining agreement existed between Local 80 and AKAL, the Division initially issued an area wage determination for the procurement, Wage Determination (WD) 94-2103 (Rev. 17) (7/9/98). The wage rate for court security officers in this wage determination was $17.57/hr. This wage rate was paid to AKAL's workers for the first pay period during the FY99 procurement year. AR Tabs C, E.

At some point roughly coincident with the beginning of the FY99 option year, the Division's staff realized that there *was* a collective bargaining agreement between Local 80 and AKAL, and that the Division had erred in issuing WD 94-2103 (Rev. 17) as the wage determination applicable to the procurement. Apparently the Division contacted AKAL and advised them that the $17.57/hr. wage rate was incorrect, and that the correct SCA wage rate for the procurement was the rate found in the collective bargaining agreement, $16.65/hr. AKAL immediately lowered the wages paid the court security officers to the $16.65/hr. rate. AR Tab C.

[2/] The facts in this case do not appear to be in dispute, and we therefore rely liberally on the representations found in the Union's correspondence with the Wage and Hour Division's staff. We note with concern, however, that the Administrative Record in this case is missing key materials that apparently were considered by the Administrator when issuing the wage determinations, such as the SF (Standard Form)-98, "Notice of Intention to Make a Service Contract," that presumably was submitted to the Division by the Marshals Service. *See* 29 C.F.R. §4.4. Moreover, although it is clear that the Wage and Hour Division was aware of the collectively-bargained wage rate, there is nothing in the case record indicating when the labor agreement was negotiated, or when or how it came to the attention of the Division's staff. Similarly, the wage determination based on the collective bargaining agreement that ultimately was issued by the Division is missing from the record.

Because the undisputed key facts in this case can be gleaned from the sparse materials provided by the Administrator, in this instance we are able to decide this case without ordering the Administrator to supplement the record. We note, however, that it is difficult for the Board to perform its review when the record forwarded by the Administrator is deficient.

In September, 1999 – almost a year later – the Union wrote to Timothy Helm of the Labor Department's Office of Enforcement Policy, Government Contracts Team, complaining about the change in wage determinations and the reduction in wage rates. Citing the regulation at 29 C.F.R. §4.165(c),[3/] the Union argued that the $17.57/hr. rate in the area wage determination (WD 94-2103 (Rev. 17)) should be applied to the AKAL procurement contract because "if a new Wage Determination is issued by the Department of Labor that is greater than the CBA, the higher rate must be incorporated . . . . When the CBA was put back in place the current wage of $17.57 should have [superseded] the CBA." AR Tab C.

Helm responded to the Union's letter, reaffirming the application of the collectively-bargained $16.65/hr. wage rate to the AKAL contract:

> Pursuant to 29 CFR 4.165(c) "if an applicable wage determination contains a wage or fringe benefit provision for a class of service employees which is higher than that specified in an existing union agreement, the determination's provision must be observed for any work performed on a contract subject to that determination". . . . The "applicable wage determination" in this section refers to the wage determination properly incorporated in a contract. Based on the information provided with your letter, it appears that the wage determination applicable to AKAL was issued in accordance with section 4(c) of the SCA to reflect the wage rates and fringe benefits set forth in AKAL's collective bargaining agreement (CBA) with the United Government Security Officers of America. Thus, the section 4(c) wage determination would be the "applicable wage determination" in this instance.

AR Tab B (emphasis in original).

The Union appealed the Helm letter in a petition for review dated October 24, 1999. This appeal, which was docketed as ARB Case No. 00-007, was dismissed as premature in response to

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[3/] This regulation provides:

> (c) The prevailing rate established by a wage determination under the Act is a minimum rate. A contractor is not precluded from paying wage rates in excess of those determined to be prevailing in the particular locality. Nor does the Act affect or require the changing of any provisions of union contracts specifying higher monetary wages or fringe benefits than those contained in an applicable determination. However, if an applicable wage determination contains a wage or fringe benefit provision for a class of service employees which is higher than that specified in an existing union agreement, the determination's provision must be observed for any work performed on a contract subject to that determination.

29 C.F.R. §4.165(c).

a motion filed by the Administrator, who noted that the Helm letter did not represent a "final decision[ ] of the Administrator." *See* 29 C.F.R. §8.1(a).

The Administrator's designee subsequently issued a "final decision" letter on November 30, 1999, repeating *verbatim* the explanation offered in the earlier Helm letter and commenting that he had "nothing further to add on this matter." This second appeal followed.

DISCUSSION

The Administrative Review Board's consideration of the Administrator's decisions under the Service Contract Act is in the nature of an appellate proceeding. 29 C.F.R. §8.1(d). We review the Administrator's rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator. *Dep't of the Army*, ARB Case Nos. 98-120 through 98-122 (Dec. 22, 1999), slip op. at 16 (citing *ITT Federal Services Corp. (II)*, ARB Case No. 95-042A (July 25, 1996) and *Service Employees Int'l Union (I)*, BSCA Case No. 92-01 (Aug. 28, 1992).

The issue presented in this case is whether the Administrator has correctly interpreted the regulation at 29 C.F.R. §4.165(c) as it applies to the wage rates issued for the FY99 procurement contract between the Marshals Service and AKAL Security.

As originally enacted in 1965, the Service Contract Act required only that the Secretary of Labor (or his authorized representative, *i.e.*, the Administrator) establish minimum SCA wage and fringe benefit rates consistent with locally-prevailing rates. Pub. L. 89-286, §2, 79 Stat. 1034 (1965). However, this requirement was modified significantly in 1972, with Congress adding a second and different wage determination mechanism for situations in which service workers were unionized and employed under the terms of collective bargaining agreements. Pub. L. 92-473, §1, 86 Stat. 789 (1972).

Under the amended Service Contract Act, the Secretary is charged with establishing the minimum wage and fringe benefit rates to be paid "the various classes of service employees" who work on federal service procurements. 41 U.S.C. §351 (a)(1), (2). The amended statute provides two different mechanisms for setting SCA wage and fringe benefit rates. At worksites "where a collective-bargaining agreement covers any such service employees," the SCA rates for the succeeding contract period are determined "in accordance with the rates . . . provided in such [collective bargaining] agreement." At worksites where there is no collective bargaining agreement covering the service workers, the SCA rates reflect the "prevailing rates for such employees in the locality." *Id.*; *see also* 41 U.S.C. §353(c). The "prevailing in the locality" wage determinations commonly are known as "area wage determinations." Procedures for issuing the two different types of wage determinations are found at 29 C.F.R. §§4.51-4.53.

As noted above, during the FY98 contract period AKAL and the Union had negotiated a collective bargaining agreement covering the security officers on the Marshals Service contract. It therefore is clear, under both the statute and the regulations, that the correct wage determination rate for the FY99 contract period was the collectively-bargained wage rate of $16.65/hr. In this particular

instance, the collectively-bargained wage rate was *lower* than the Administrator's $17.57/hr. area wage determination rate for court security officers.

The Union argues that the area wage determination (WD 94-2103 (Rev. 17)) is an "applicable" wage determination within the language of 29 C.F.R. §4.165(c) ("if an applicable wage determination contains a wage or fringe benefit provision for a class of service employees which is higher than that specified in an existing union agreement, the [wage] determination's provision must be observed"), and that the lower hourly rate in the collective bargaining agreement therefore cannot be applied to the Marshals Service contract. The Administrator rejects this argument in his final decision letter. We affirm the Administrator's decision, because the Administrator's interpretation of 29 C.F.R. §4.165(c) is consistent with the plain language of the regulation.

Section 4.165 provides general guidelines for complying with the wage and fringe benefit requirements of the Act and its implementing regulations. The thrust of Subsection 4.165(c) is made clear from its opening sentences:

> The prevailing rate established by a wage determination under the Act is a minimum rate. A contractor is not precluded from paying wage rates in excess of those determined to be prevailing in the particular locality.

29 C.F.R. §4.165(c). This language essentially restates the overall purpose of the Act – to establish *minimum* wage rates for employees on federal service procurements, and not to establish a fixed or mandatory wage rate.

The balance of the subsection addresses the interplay between the Labor Department's SCA wage determination rates and collective bargaining agreements that may have different wage or fringe benefit requirements (either higher or lower):

> Nor does the Act affect or require the changing of any provisions of union contracts specifying higher monetary wages or fringe benefits than those contained in an applicable determination. However, if an applicable wage determination contains a wage or fringe benefit provision for a class of service employees which is higher than that specified in an existing union agreement, the determination's provision must be observed for any work performed on a contract subject to that determination.

Id. This language merely reinforces the message of the opening sentences, *i.e.*, that (1) if a collective bargaining agreement has *higher* wage rates than the applicable SCA wage determination, the Act does not require a *reduction* of those higher rates, and (2) that a collective bargaining agreement containing *lower* rates does not trump the minimum wage and fringe benefit requirements of a duly-issued SCA wage determination.

The Union's assertion that the area wage determination's $17.57/hr. wage rate must be paid to the employees on AKAL's FY99 contract with the Marshals Service contract assumes that the

Washington, D.C., area wage determination is "applicable" to the procurement, apparently under the theory that the area wage determination has some *general* applicability to all federal service contracts in the locality. However, in order to reach this result we would need to ignore entirely the language of both the statute and the SCA regulations. The Service Contract Act directs the Secretary to issue "*the* minimum monetary wages [and fringe benefits] to be paid the various classes of service employees" who will work on a service procurement. 41 U.S.C. §351(a)(1). Ordinarily, for any particular class of service employees on a given contract there is a single minimum wage rate, not multiple minima. Although the amended statute has two different mechanisms for determining the minimum monetary wages, it is clear that these mechanisms are provided as mutually exclusive alternatives: *either* the "prevailing in the locality" wage rate applies to a procurement, *or* the collectively-bargained wage rate applies, depending on the facts applicable to the procurement. *Id.*; *see also* 29 C.F.R. §§4.3, 4.4, 4.50. In the case before us, it is undisputed that a collective bargaining agreement existed between the Union and AKAL during the FY98 contract period; thus, we concur with the Administrator's finding that the only wage determination "applicable" to AKAL's FY99 follow-on contract would be a wage determination based on the collectively-bargained wage rates.

This view of the 29 C.F.R. §4.165(c) regulation (*i.e.*, that there is only one wage determination rate "applicable" to a procurement contract for any given job classification) is supported by its legislative history. The regulation was first promulgated in 1967, in a form only slightly different from that which exists today. *See* 32 Fed. Reg. 10132, 10143 (July 8, 1967). Because the 1967 regulation pre-dates the 1972 amendments that added the special wage determination mechanism applicable to unionized work sites, it was developed at a time when only one type of wage determination was being issued by the Administrator: the "prevailing in the locality" wage determinations. Because there was only one type of wage determination in existence, the last sentence of the 1967 regulation warned generally of situations in which collectively-bargained rates might be lower than the rates found in "**a** [wage] determination" issued by the Administrator, using this language:

> However, if **a** [wage] determination for a class of service employees contains a wage or fringe benefit provision which is higher than that specified in an existing union agreement, the determinations's provision will prevail for any work performed on a contract subject to the determination.

Id.; 29 C.F.R. §4.165(c) (1968) (emphasis added).

When the text of the §4.165 regulation was updated in 1981, several years after the successorship provisions had been added to the Act, the 1967 reference to "**a** [wage] determination" was modified in a manner that specifically addresses the problem raised in this case: that multiple wage rates for a given job classification would be issued by the Wage and Hour Division within a locality on different procurement contracts, depending upon whether the "prevailing in the locality" approach or the collectively-bargained approach was used. The 1981 modifications produced the regulation in its current form:

> However, if **an applicable** wage determination contains a wage or fringe benefit provision for a class of service employees which is

> higher than that specified in an existing union agreement, the determination's provision must be observed for any work performed on a contract subject to that determination.

46 Fed. Reg. 4320, 4334, 4363 (Jan. 16, 1981); 29 C.F.R. §4.165(c) (1999) (emphasis added). Thus the key question under the modified §4.165 is not whether **a** wage determination exists that has wage rates higher than are found in a collectively bargaining agreement, but specifically whether the **applicable** wage determination has higher wage rates.

In light the plain language of the regulation and its legislative history, the Administrator's interpretation of the regulation is clearly correct: the only wage determination "applicable" to the Marshals Service procurement was the wage determination based on the collectively-bargained rate of $16.65/hr. Accordingly, the Administrator's decision is **AFFIRMED** and the Union's petition for review is **DENIED.**

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member